



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 20, 1998

Ms. Linda Wiegman
Supervising Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-0501

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 112772.

The Texas Department of Health (the "department") received a request for copies of survey investigations for specific Texas home health agencies terminated from the Medicare program from 1995 to the present. You have submitted the statements of deficiencies and plans of correction of the specified home health agencies for our review. You assert that portions of these records, which you have marked, are made confidential by various state statutes or by the common-law right to privacy and therefore are excepted from required public disclosure under section 552.101 of the Government Code.¹ Government Code section 552.101 excepts from disclosure information that is made confidential by law, including information made confidential by statute.

As previously noted, the submitted information consists of federal HCFA 2567 statements of deficiencies and plans of correction. Federal regulations require the department to release the HCFA 2567 statements of deficiencies and plans of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 (1988) at 5.

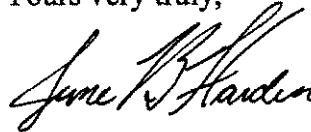
¹The department failed to request an open records decision from this office within ten days of receiving the request for information, a fact that generally results in the presumption that the requested information is public. *See* Gov't Code 552.302. However, because the privacy rights of third parties and the applicability of confidentiality provisions are implicated, these reasons are compelling and sufficient to overcome that presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). Therefore, we will consider your argument that the requested documents are confidential by law.

As the reports are signed by a provider representative and the "provider's plan of correction" portion of the report appears to contain the provider's comments to the report, we believe the provider has had a reasonable opportunity to review and comment on the report. Accordingly, you must release these reports, but with deletions of information that identify persons specified in the regulation.

As we have concluded in several previous rulings to the department, we believe that federal law requires the department to release de-identified HCFA 2567 documents. *See* Open Records Letter Nos. 97-2843 (1997), 97-1514 (1997), 97-1492 (1997), 97-1472 (1997), 97-1388 (1997), 97-1230 (1997). In most instances, we do not believe that a patient's medical condition or diagnosis identifies that patient when the name is redacted from the HCFA 2567 forms. As federal provisions govern the public disclosure of the HCFA 2567 forms, we believe that the federal law prevails to the extent it may conflict with the Texas Medical Practice Act and chapter 611 of the Health and Safety Code regarding information obtained from medical and mental health records. *See English v. General Electric Co.*, 110 S.Ct. 2270, 2275 (1990) (state law preempted to extent it actually conflicts with federal law). Furthermore, we believe the de-identification required by federal law is sufficient to protect the privacy interests of the patients.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/glg

Ref.: ID# 112772

Enclosures: Submitted documents

cc: Mr. Travis E. Poling
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(w/o enclosures)